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No. 90-1680

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Petitioner,

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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POINT I

THE RIGHT OF FEMALE DOMESTIC VIOLENCE VICTIMS TO EQUAL PROTECTION OF THE LAW WAS CLEARLY ESTABLISHED IN 1985

Respondents incorrectly contend that Debbie Evans' right to equal protection, as guaranteed by the fourteenth amendment, was not clearly established for purposes of satisfying the standard set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987). By contending that the law was not clearly established in 1985, respondents assert that it was permissible for police officers to treat female victims of domestic violence differently from other crime victims. Respondents' position is premised on the argument that no decision within the Third Circuit had previously ruled that the complained of conduct was unlawful.

A specific, binding precedent is not required to show that a right is clearly established in defeat of a claim of qualified immunity. *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). In the absence of binding precedent, a court should look at all available decisional law to determine whether a right is clearly established. *Id.; Hedge v. County of Tippecanoe*, 890 F.2d 4, 7 (7th Cir. 1989) ("In the absence of a controlling precedent we look to all relevant case law in an effort to determine whether at the time of the alleged acts a sufficient consensus had been reached indicating that the official's conduct was unlawful"). Therefore, the presence of controlling precedent is not a necessary requirement to find that a particular right has been clearly established for purposes of overcoming qualified immunity. *Hedge*, 890 F.2d at 7.

The approach to take where no binding precedent exists is to assess the direction in which the law is heading. "To state the proposition in another way, we seek to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 431 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 368 (1990).

At the time Ms. Evans sought the assistance of the Roselle Police Department, one case had recognized that police conduct treating victims of domestic violence differently from other assault victims constituted gender-based discrimination violative of the equal protection clause. *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). The ruling in *Thurman* represented a critical point in recognizing the tragic harm that has resulted due to the refusal by law enforcement authorities to view domestic violence as a "real crime." The Third Circuit took notice of this trend in *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026 (3d Cir. 1988), and held that female domestic violence victims had a clearly established right to equal protection of the law. The decision in *Hynson*, just three years after the tragic murder of Debbie Evans, shows that recognition of this right truly was "merely a question of time." *See Cleveland-Perdue*, 881 F.2d at 431. Analyzing whether the trend in the law is pointed towards recognition of the asserted right "makes eminent sense for it precludes an individual from escaping liability for unlawful conduct due to the fortuity that a court in a particular jurisdiction had not yet had the opportunity to address the issue." *Id.; Hedge*, 890 F.2d at 7.

With regard to respondents' attempt to refute petitioner's argument that their conduct violated the equal protection clause by treating female domestic violence victims differently from other crime victims, respondents obviously misunderstand the legal reasoning of *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979), which sets forth a two-part analytical framework to assess whether unconstitutional gender discrimination has occurred. Contrary to respondents' mistaken belief that "[u]nder Petitioner's reasoning, any action which was ultimately found to have an adverse *impact* on women . . . would be unconstitutional," petitioner's analysis is focused, not on the disproportionate impact caused by the conduct of the Roselle Police but, rather, on the invidious discrimination toward women which results in the disproportionate impact on females. Brief in Opposition at 6 (emphasis added).

Respondents note that petitioner has "produced no *evidence* as to the distribution between the sexes of domestic victim violence in Roselle, N.J." Brief in Opposition at 7 n.1 (emphasis in original). The reason no such evidence exists to document the discriminatory enforcement of the law in Roselle, unlike numerous studies elsewhere, is quite simple: the borough maintained no records whatsoever regarding domestic violence incidents despite requirements under the law to do so. *See* N.J. Stat. Ann. § 2C:25-8 (West 1982).

The concluding remarks by respondents that the Court should not accept this petition because "only a handful of cases" would be affected by a ruling flies in the face of all notions of justice and decency. Certainly, the matter is no less important to the family of Debbie

Evans who patiently have waited too many years in an attempt to see that justice be done. The issue constitutes an important question of federal law that should be resolved by the Court.

POINT II

THE ROSELLE POLICE VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY TREATING DOMESTIC VIOLENCE VICTIMS DIFFERENTLY FROM OTHER VICTIMS OF VIOLENT CRIMES WITHOUT ANY RATIONAL BASIS FOR SUCH A DISTINCTION

Respondents' brief in opposition neglects to address the failure by the Third Circuit to analyze petitioner's allegations of constitutional violations in terms of whether there was a rational basis to support the differential treatment of domestic violence victims from victims of nondomestic violence. Since the opinion of the Third Circuit runs counter to decisions of the Supreme Court and departs from the accepted and usual course of judicial proceedings, the Court should grant the petition for a writ of certiorari pursuant to Rule 10.1(a) and (c).

POINT III

THE ROSELLE POLICE VIOLATED THE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS OF DEBBIE EVANS BY DENYING HER ACCESS TO THE COURTS

Respondents violated Debbie Evans' constitutional rights by actively interfering with her right of access to

the courts. By misrepresenting material information to the assistant prosecutor, Detective Grabowski denied Ms. Evans access to the criminal courts. His conduct thereby triggered a duty to inform her of the right to obtain a restraining order, pursuant to the New Jersey Prevention of Domestic Violence Act. The Prevention of Domestic Violence Act provided a means of access to the judicial system. In the context of this case, the violation of this statute along with respondents' affirmative acts which blocked Debbie Evans from obtaining judicial relief constituted a violation of her right of access to the courts.

As previously argued, this matter is distinct from the Court's decision in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989). Petition at 23. That decision has since resulted in confusion among the courts of appeals regarding the magnitude of state involvement required before giving rise to a constitutional duty to protect. Petitioner submits that this matter is no different than those addressed in other circuits which have found that the state bore an affirmative duty to provide assistance. *E.g.*, *Gregory v. City of Rogers*, 921 F.2d 750, 754 (8th Cir. 1990); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1784 (1990); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990). *See* Petition at 24-25. Thus, a major gap exists between this Court's decision in *DeShaney* and the manner in which it has been applied by the various circuits.

An important question of federal law remains unsettled and should be resolved by this Court. The grim alternative is the perpetuation of these divergent approaches pursued by the circuits in interpreting the

Court's difficult decision in *DeShaney*. Accordingly, the petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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June 3, 1991